In the

Supreme Court of the United States

JOHN W. WARNER, Secretary of the Navy,

Petitioner,

vs.

JOHN W. FLEMINGS,

Respondent.

No. 71-1398

Washington, D. C.
December 4, 1972

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Washington, D. C.
Monday, December 4, 1972

The above-entitled matter came on for argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; for the Petitioner.

MICHAEL MELTSNER, ESQ., Columbia University School of Law, 435 West 116th Street, New York, New York 10027; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first this morning in No. 71-1398, Warner against Flemings.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GRISWOLD: May it please the Court:

This case is a sequel to O'Callahan against Parker, 395 U.S., and Relford against the Commandant in 401 U.S., involving court martial trials of servicemen. It involves the application of O'Callahan in determining when an offense is service-connected, and it involves the question of whether O'Callahan should be applied retroactively.

The case is here on the Government's petition for a writ of certiorari to the Court of Appeals for the Second Circuit. I may say that the immediately following case is here on the defendant's petition for certiorari from a conflict decision of the Court of Appeals for the Fifth Circuit on somewhat varying facts. In this case, both courts below have ruled in favor of the respondent. The present Court proceeding began in October, 1970, when the respondent filed suit in the United States District Court for the Eastern District of New York, relying on O'Callahan and seeking to compel the Secretary of the Navy to overturn the respondent's 1944 conviction for auto theft and to correct

his military record insofar as it shows a dishonorable discharge.

The answer filed in the district court on behalf of the Secretary of the Navy recited the respondent's conviction by court-martial on two charges, one of absence without leave and the other of fact, the conviction being on a plea of guilty to both charges. And the record of the court-martial was attached as an exhibit, and this appears at pages 14 to 24 of the Appendix filed in this Court.

The case was tried on the pleadings and affidavits which tend to show these facts. In 1944 the respondent, who was 18 years old at the time, was a seaman second class in the United States Navy, stationed in New Jersey. On August 4, 1944, he received a pass for a three-day leave. This expired on August 7th and he failed to return to his post. Ten or eleven days later--and I use the two because it appears one way one place in the record and another another place in the record. On August 17th or 18th an automobile was stolen from a city street in Trenton, New Jersey. This was owned by Ernest Bush who was in service in the United States Signal Corps, though the automobile was his personal property and not in any sense the property of the Government.

Two days later, on August 20, 1944, which is 13 days after his leave had expired, the respondent was apprehended

in Pennsylvania by the state police. He was then in the stolen car. He now says that he was a hitchhiking passenger, but there is nothing in the record of the court-martial which shows or even intimates this. The state police turned the respondent over to the naval authorities, and he was confined in New York for trial. He was then formally charged with being absent from his duty station during wartime for a period of 13 days and with the theft of an automobile, and the charge reads "from the possession of a civilian" on page 17 of the Appendix, while the United States was at war.

A court-martial was held at the Brooklyn Naval Yard in October, 1944. The record of the court-martial shows that the respondent was represented by counsel, Lieutenant George B. Folly of the U. S. Naval Reserve. It does not appear whether he was a lawyer or not.

The respondent pleaded guilty to both charges. He was sentenced to three years imprisonment, reduction in rank, and a dishonorable discharge. The sentence was served with appropriate reduction of time, and he was dishonorably discharged in October, 1946. It is this court-martial judgment and the resulting dishonorable discharge which the respondent sought to set aside by the proceeding which he brought in the district court below.

In the Relford case we contended that O'Callahan should not be applied retroactively so as to invalidate

court-martial decisions where the trial had been held before O'Callahan was announced. But the court did not find it necessary to pass on that question.

We make the same contention here, and I shall also contend at the close of my argument that the offense here was service-connected even if the O'Callahan case is otherwise applicable.

Both courts below in deciding the retroactivity question against the Government's position relied on certain passages in the O'Callahan opinions. I used both the majority opinion and Mr. Justice Harlan's dissenting opinion in which the Court or members of the Court used jurisdictional terminology. This appears, for example, in the opinion which is printed in the Appendix to the petition for certiorari at pages 38 to 40, and there are frequent references in the opinion to jurisdiction.

The courts below concluded that courts-martial do not have jurisdiction of non-service connected crimes. From this they concluded that since there has been no formal constitutional amendment on this subject, it must follow that courts-martial never did have jurisdiction of non-service connected crimes and if the court-martial in this case did not have jurisdiction, its judgment and sentence are void and should be corrected. It all follows in the opinions below with the inevitability of an iron-clad syllogism.

We suggest that the error below comes from taking the jurisdictional language used by the Court and by the dissent in O'Callahan with mechanical rigidity. We suggest that the question whether that decision should be applied retroactively must be decided on the basis of the criteria which this Court has generally invoked in determining the temporal impact of the announcement of new constitutional doctrines in other cases.

The automatic retroactive application of new constitutional decisions is a conceptual mode of thought widely accepted in the 19th century. But this Court has clearly rejected it in a number of cases. These cases recognize that constitutional doctrine evolves and is not discovered. What the Court has done is to show a candid willingness to leave undisturbed decisions rendered in conformity with prior constitutional pronouncements unless substantial justice otherwise requires. And I think that this is in accord with a passage from then Chief Judge Cardozo in his "Nature of the Judicial Process" where he referred to the problem of the effect of overruling decisions, and he said at page 148 of the "Nature of the Judicial Process": "Where the line of division will someday be located I will make no attempt to say. I feel assured, however, that its location, wherever it shall be, will be governed not by metaphysical conceptions of the nature of

judge-made law, nor by the fetish of some implacable tenet such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice."

O'Callahan was in the most literal sense a clear break with the past, a phrase which the Court used in its Desist opinion. The fact that this marked departure from generally accepted principles of military jurisprudence, the fact that this was cast in jurisdictional terms, should not, we submit, foreclose consideration under standard criteria as to how O'Callahan should apply to situations such as presented here where the court-martial conviction became final long ago.

What O'Callahan decided is that in the absence of service connection, court-martial jurisdiction cannot be exercised so as to take away the Fifth and Sixth Amendment rights to indictment and trial by jury. As this Court said in Linkletter, whatever the jurisdictional implications of the decision, the Constitution neither prohibits nor requires that it be given retrospective effect.

Rather, the issue is, as in other retroactivity cases, whether a new trial should be given to those already tried.

The tests applicable in this problem were stated in Stovall against Denno, and the relevant quotation is set forth

on page 18 of our brief: "(a) the purpose to be served by the new principles; (b) the extent of the reliance by law enforcement authorities on the prior law; and (c) the effect on the administration of justice of a retroactive application of the new approach." All of these point to non-retroactive application here.

The purpose of the new rule was to make applicable the guarantees of indictment and jury trial in cases involving non-service connected offenses. These are important guarantees, but they do not involve the integrity of the truth-finding function, particularly in a case such as here, where the defendant has pleaded guilty.

This Court's decision in DeStefano against Wood involved jury trial. But this Court held that its decisions in Duncan and Bloom need not be applied retroactively.

This Court cannot have meant by its decision in O'Callahan that all non-jury trials are inherently unfair. Indeed, in the quotation from DeStefano set forth on page 20 of our brief, the Court said: "We would not assert, however, that every criminal trial--or any particular trial--held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would by a jury."

If O'Callahan meant that all jury trials were unfair, then all court-martials would violate the Fifth Amendment and this Court could not have decided Relford or

DeStefano as it did. Relford did not involve a strictly military offense. It was the crime of rape committed on a military reservation. If there were indeed reservations about the integrity of the military truth-determining process at trials of the sort involved in Relford, that case could not have been decided as it was.

The Uniform Code of Military Justice became effective in 1950 after the trial in this case. But there is no reason to condemn all court-martial convictions prior to 1950 dealing with non-service connected crimes as inherently unfair because tried without grand or petit juries. In Burns against Wilson, involving a pre-1950 court-martial, Chief Justice Vinson concluded that there was no "fundamental unfairness in the process whereby petitioner's guilt was determined."

The second Stovall criterion is reliance of the law enforcement authority. This is, I think, as clear a case of reliance as could be found. For many years military trials of servicemen for non-service connected crimes was the established practice. This proceeded not only in terms of an act of Congress but also in light of many statements by this Court indicating that military status of the accused was an adequate predicate for military trial. This Court said in Kinsella against Singleton, "Military jurisdiction has always been based on status of the accused rather than

on nature of the offense." And similarly in Whelchell [?] against McDonald in 340 U.S., a case not cited in our brief nor in the O'Callahan opinion, this Court said in an opinion by Mr. Justice Douglas, "The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions." There was no suggestion that this applied only where the offense was service-connected either in this or in any other decision of this Court.

O'Callahan was, we submit, a clear departure from the generally accepted and understood and uniformly applied law up to that time. To use some phrases, it was the creation of a precedent; it was a mutation, which is a sharp and unpredictable change in the nature of an organism; it was invention in the classic sense, that is, a result that was not obvious to those skilled in the art, as this Court said in Graham against John Deere & Company. And if I may adopt the language of my one-time colleague as a dean, now Professor Louis Pollock of the Yale Law School, he recently said, "On a wide range of frontier problems the courts are taking an almost unprecedented architectural initiative." This was, I believe, a frontier problem where the line had never been crossed before and the Court's decision in O'Callahan was, I think, fairly called architectural creation. "In the absence of clear requirements of essential

justice, that is the sort of decision which should not be applied with retroactive effect." And let me here interject the well known case of United States against Chambers back in 291 U.S., where there was an actual formal amendment to the Constitution, the repeal of the Eighteenth Amendment, and the Court held that this was inapplicable to offenses where the judgment had become final before the amendment was adopted.

And finally as to effect, this cannot be measured precisely, but it is clear that it will be substantial. We have in this case a court-martial conviction 28 years ago based on a plea of guilty. There were since the beginning of World War II, approaching 30 years ago, literally millions of court-martial convictions in the three services, with most statutes of limitations operating against upsetting them. And there must be hundreds of thousands of these which involved offenses which were not service-connected. No one can tell how many claims will be raised, but all will be entitled to make claim, and surely many will make claim if this Court decides that O'Callahan is to be applied retroactively. It will be a massive amnesty unforeseen and unforeseeable and without, I submit, sufficient warrant.

There is also the difficulty of reconstructing events over many years in the past. As a practical matter,

any retrial in a different form is almost sure to be frustrated in the older cases.

There is further the still continuing problem of determining what is service-connected. Relford discussed the possible interrelation of 12 different factors, and these were counted and weighed in various ways in the court below. The possible combinations of pro and con permutations are almost endless, as the decisions below show; tallying up the pro factors and comparing them with the con factors in order to make the service-connection judgment many years after the trial appears unduly cumbersome and not at all satisfactorily accurate.

In this case, the offense was committed in wartime. That might be well enough alone to make it service-connected. Neither in O'Callahan nor in Relford was the offense committed in wartime. Moreover, the offense here was committed while the respondent was admittedly absent without leave, which is clearly a service-connected offense. He was, in fact, ten or eleven days over his leave period, not some case where he missed the bus and failed to get back, when the car was stolen. And he was arrested 16 days after his leave expired, moving away from his station, from his duty station, in the stolen automobile in wartime.

Our history shows many instances where non-service connected crimes by servicemen have been tried by court-

martial during time of war. Congress expressly authorized such trials during the Civil War; during wartime there is more need to keep units together, to have a system which facilitates rehabilitation. This is particularly true in the Navy where ships move out to sea and where it may well not be feasible to leave ashore not only the defendant but also other members of the ship's company who may be essential witnesses.

Q Mr. Solicitor General, I do not recall whether you touched on it in your brief or not, but does the statute on correction of military records permit correction, proceedings for a correction, after the death of the serviceman?

MR. GRISWOLD: Mr. Chief Justice, I do not know, but I believe not. The board for the correction of records has refused to make the correction here. If it does make the correction, it will only be pursuant to an order of the Court and therefore will not be pursuant to any statutory authorization to the board.

Q I was wondering whether ancient proceedings of men now long dead might be sought--

MR. GRISWOLD: I have no doubt that there will be efforts to do so in order to establish pension rights of one kind or another, and certainly that question will have to be litigated, and I am not prepared to say what the legal

factors might be that would bear on it. Quite apart from those who are dead, there must be many hundreds of thousands still living who had been convicted in court-martials in the past 30 years, some of whom may be able to make the claim that their offense was not service-connected.

At any rate, when the wartime factor is added to the element of absence without leave and the offense, stealing an automobile, facilitated that absence, there is, we submit, a sufficient military interest to bring the respondent's crime of auto theft within the service-connected category. The offense was committed in wartime and infringements of a military offense that was appropriately considered to be particularly serious in time of war. But let me add at this point that this very discussion at the close of my argument illustrates one of the problems inevitably arising if O'Callahan is held to be retroactive, which will be that of the great many potential cases, at least for a long time practically all of them will have to be litigated because the process of telling what is service-connected and what is not, taking out this special group that was involved in Relford--that is, those occurring on a military base--if it does not occur on a military base, if it occurs within the territory of the United States, then the problem of telling what is and what is not service-connected can be extraordinarily difficult and not really--that it is

something that will have to be litigated, but it is something upon which the standards to be applied by the courts in determining the issue are extremely doubtful and uncertain.

Q Do you suppose it is possible that the test of what is or is not service-connected might be quite different in time of a declared war from what it would be in other times?

MR. GRISWOLD: Yes, Mr. Justice.

Q And, in other words, it could be even held that any offense by military personnel in time of a declared war is ipso facto service-connected?

MR. GRISWOLD: That would be outer reach of our contention, and that contention would surely be made if O'Callahan is held to be retroactive and will have to be decided perhaps by another case which will come to this Court.

Q It could be decided in this case, could it not?

MR. GRISWOLD: It could be decided in this case, yes. If not, in the next case, I believe. But in this case it could be decided that this offense was service-connected merely because it was wartime and that would enable the Court to dispose of this case as it did Relford without considering the retroactivity issue.

Q It is not involved in this case, but what status are we in right now?

MR. GRISWOLD: What status, sir?

Q War conditions or what?

MR. GRISWOLD: We are not in a status of declared war. What the application of the rule would be, would be another case which would have to--

Q It was a declared war; in '44 it was a declared war.

MR. GRISWOLD: In 1944 it was a declared war universally known and accepted to be such. Moreover, it is a long time ago, 28 years ago, and there ought to be some time when some of these things are not dredged up and gone over again. For these reasons we submit that the judgment below should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Meltsner.

ORAL ARGUMENT OF MICHAEL MELTSNER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MELTSNER: Mr. Chief Justice, and may it please the Court:

The Government contends that the relevant question before the Court is whether the absence of trial by jury and grand jury indictment in military trials so infected the

integrity of the truth-determining process that O'Callahan must be applied retroactively to this case. But O'Callahan took the military justice system as it found it in 1969, and the Court still determined that the procedures available at that time were insufficient to rebut a claim that military jurisdiction ought not be limited to necessity, to the special interests of the military.

I take it that the Court focused on the right to trial by jury and the right to indictment by grand jury and several other rights, which are discussed in the opinion, such as the independence of the civilian judiciary as compared to the military, because those were protections which were not granted to a military defendant in 1969. Surely if other fundamental procedural protections had not been granted to Mr. O'Callahan at the time of his trial, which took place under the Uniform Code of Military Justice, I assume the Court would have also discussed and relied upon the absence of those procedural protections. I can see no reason why the Court would not do so.

In this case the Court is confronted with a man who was convicted by court-martial totally lacking in fundamental procedural protections, totally lacking in the protections which this Court said were enough when it decided that Duncan v. Louisiana ought not be applied retroactively. In short, the litigant in DeStefano at least had a right to a

trial by a judge. That was not the case in 1944 in the United States Navy. There was no right to a judge. There was no right to any legally trained person being present at the court-martial. There was no right to a grand jury, of course, but there was no right also to any pre-screening of any sort. The charge was determined in the absolute discretion of the convening authority, that convening authority then selected the court-martial which tried the case, and was the sole review in this particular case. There was no civilian review in this case; there was not even the commutation review, at least as shown by the record, which the Secretary of the Navy exercised in certain cases. In short, there was no right to a judge, there was no right to a pre-screening process, there was also no right to counsel present in the United States Navy in 1944; there was no right to any judicial review of any kind. There was no protection from command influence. A subpoena power was in the hands of the judge advocate or prosecutor. The process available to the court-martial was limited to the state in which it sat. There was no right to pre-emptory challenge in the United States Navy in 1944, no right to trial in the vicinage; a majority was sufficient to convict. There were no enlisted men on the panel; that was not permitted. And court-martial members could be replaced in the middle of the proceeding; they had no tenure right whatsoever.

Such procedures, especially when administered in the context of a military establishment clearly raise, it seems to me, dangers of infecting the integrity of the truth-finding process. Indeed, it was this very reason and because of the arbitrariness which returning servicemen had experienced during the Second World War that a storm of protest was raised and the Uniform Code was passed in 1950 remedying several, although not all, of the procedural deficiencies I have outlined.

In the Navy it is interesting to remember that the procedures which were applied to John W. Flemings in 1944 had basically been formulated by the Continental Congress in 1775 at the time when the military establishment, as Senator Ervin has mentioned in a passage relied upon by the court below, at a time when the service was mainly staffed by mercenaries.

In light of this regime of procedures which simply must raise questions about the integrity of the fact-finding process, I think the rule of Williams v. The United States, and there is really no need for further inquiry into the reliance and administration of justice aspects of the rule which we are talking about here. But--

Q Going back to your reference to the fact that the Code continued essentially the same from 1775 until the 1950 revision, I suppose the gentlemen in Philadelphia were

well aware of that when they were drafting Article I of the Constitution, were they not?

MR. MELTSNER: Nevertheless, in O'Callahan this Court plainly construed Article I to restrict jurisdiction to where it was absolutely required and necessary by special military interests and--

Q In your view, is the only escape from retroactivity the overruling of O'Callahan? Do you think it is an all-or-nothing approach here?

MR. MELTSNER: I certainly think retroactivity must follow from O'Callahan, at least the cases of this sort, at least the cases tried under these procedures.

Q Cases tried before 1950?

MR. MELTSNER: That is correct. That is correct.

The point has been made at some length in the Government's brief and here today by the Solicitor General that O'Callahan was an invention or, I believe the word was, a mutation. Perhaps it was in theory, although it seems to me that O'Callahan merely applied the principles which this Court had developed over a course of years in limiting military jurisdiction to a different class of cases. But one thing is certain, and that is that there was no reliance on O'Callahan law in fact. There may have been a reliance in principle, but there was no reliance in fact. From at least 1955, civilian offenses have generally been turned

over to the civilian authorities. In its O'Callahan brief the United States represented to this Court that military jurisdiction granted by Congress is in practice a residual jurisdiction. Army regulation makes it Army policy to deliver members to state and local civilian authorities for trial upon request unless the best interests of the service would be prejudiced thereby. In fact, the state--

Q That has been at least since 1955?

MR. MELTSNER: That is correct.

Q We are dealing in this case, however, with a time when the nation was totally at war. Do you happen to know whether or not it was the policy of the military back then to do that? My personal knowledge is that it was not. I was as a young naval officer entrusted for a while every morning with going down to the police court in Norfolk, Virginia and getting all the sailors out of there and getting them back to their ships and getting the civilian authorities to cede and waive jurisdiction.

MR. MELTSNER: I do not know the practice during wartime, Mr. Justice Stewart.

Q Whether in wartime or not, do you think that is an important factor?

MR. MELTSNER: I would like to deal with that when I get to the effect of the decision, and I will do that in just a moment. My point here merely is that in 1968

90 percent of offpost rapes, 95 percent of all offpost murders, 96 percent of all housebreakings, and 94 percent of all offpost motor vehicle cases, the kind of offense involved here, were turned over to the civilian authorities. When we get to wartime, I am sure the percentages are lower at that time. But the impact--

Q You need the men to get back in their units to carry on the war.

MR. MELTSNER: Of course. The impact, however, of retroactivity of O'Callahan on those cases will be totally restricted to the processing of applications for change in discharge status by the administrative agency which Congress has given that task to, correction of military records, and to the administrative officials in the judge advocate general's court.

While at first blush I would concede, as the court below said, it appears as if this is a staggering problem, the impact of retroactivity, the more one looks the more one sees it evaporate. For example, 70 percent of all military offenses, of all offenses tried by court-martials are military offenses. There is no problem in determining that those are service-connected offenses. Eighty percent of them take place on post. Thirty percent of them have taken place overseas and there is no question but that those are service connected offenses. There are only 4,000 men in custody of

the military at the present time. A survey done by Mr. Blumenfeld based on Army records, which is discussed at length in my brief, concludes that one percent of these cases are likely to involve non-service connected offenses. These statistics were put before the court of appeals; they were put before this Court. At no time has the United States qualified them in any way. There has been no attempt to explain these statistics away.

Q Mr. Meltsner, were they offered in the record?

MR. MELTSNER: The statistics were offered in the record. Similar statistics were argued to the district judge.

Q They are in the record?

MR. MELTSNER: No. These statistics were not in that they were briefed before the lower courts, and in none of the briefs filed by the United States is there any argument that these statistics are not perfectly accurate.

Q Do they concede that the statistics are accurate?

MR. MELTSNER: They do not address themselves to the statistics, Mr. Justice Rehnquist, although the statistics are Army statistics. Mr. Blumenfeld expressly states--he is a former lawyer in the military system--he states the sources of his statistics and at no point does the United States make any attempt to question their accuracy or their

applicability.

Q If you are going to rely on them, why do you not offer them in the record so that we can have sort of a conventional review of them?

MR. MELTSNER: Mr. Blumenfeld's article, Your Honor, was not published at the time this case was tried in the district court. It came to my attention as appointed counsel while the case was on appeal.

The Court of Military Appeals has held that O'Callahan will be retroactive to cases which came up on direct review. Blumenfeld's study, as I suggest, monitored a year and a half of cases before the Court of Military Appeals and determined that only one percent were applicable, would be non-service connected.

Most of the requests that are likely to come up under O'Callahan, if it is held retroactive, surely can be handled handled by these administrative agencies, and here it is interesting to note that the services are quite familiar with procedures for returning pay; they have a computerized system for doing this, and they have a lawyer's review section certainly able to develop standards which will be applied to determine whether large classes of cases are service-connected or not.

Thus, under any application of the three-factor test, we contend that O'Callahan must be held retroactive.

Nevertheless, I continue to believe that the court below was correct when it alternatively rested retroactivity on the jurisdictional nature of O'Callahan. It has always been thought a settled rule that the judgment of a court without subject matter jurisdiction was void and could be collaterally attacked. And the Government cites no criminal case of purporting to modify this principle.

Linkletter and its progeny dealt with rules of procedure. The only exception is the U. S. Coin decision where this Court decided that when the substantive offense could not be charged, retroactivity follows automatically without reference to the three-factor test.

Prospectivity may be appropriate despite the jurisdictional nature of a rule when good reasons are presented, but the Government has not supplied any good reasons in this case, and neither the Government's brief, the opinions of the courts that have dealt with this problem of O'Callahan's retroactivity,nor the academic commentators have fashioned criteria that should govern in this area. It seems to me that by changing the conventional rule as to jurisdictional cases the Court is opening up itself to the spectre of retroactivity being a decisional issue in every case. It is putting a cloud of doubt on some fairly accepted notions such as that jurisdictional rules cannot be waived and that jurisdiction cannot be given by consent.

Finally, it seems to me that prospectivity may in the future act to induce some member of the military establishment to try and extend the power which this Court indicated in O'Callahan had to be strictly limited to a special class of cases by a principle of necessity. Military jurisdiction,is a jurisdiction, I would contend, based on necessity. We try and make it as fair as we can, but in no sense can it compare to the civilian court system.

The Government also contends that the auto theft involved here was service-connected. Few of the factors found by this Court in Relford or by the Court of Military Appeals, which has extensively considered this issue in numerous cases, few of the factors which have been found to create military jurisdiction are present here. The theft did not take place on a base or overseas. It did not involve military property. This is civilian offense. The civilian courts were open. The offense was one they traditionally tried.

Q Mr. Meltsner, if the car had been on the base and it was stolen on the base and then utilized in the fugitive status or the absent-without-leave status, would you say that would be service-connected?

MR. MELTSNER: As I understand Relford, Mr. Chief Justice, that would convert the offense into a service-connected one.

Q But if it is across the street from the base, then it is not service-connected?

MR. MELTSNER: That is the line that I understood Relford to draw; correct.

Q Even if the car is used as part of the flight?

MR. MELTSNER: Pardon me?

Q He was engaged in flight from his base, was he not?

MR. MELTSNER: There is no evidence in this record whatsoever that the car was used to flee.

Q He was fleeing away from his post, duty station, was he not?

MR. MELTSNER: We do not know exactly what direction he was traveling in, but the defendant was hitchhiking, according to his allegations. But the military offense of absence without leave had been completed some ten or eleven days before this car theft, a theft, by the way, which the respondent here stoutly denies and contends he did not commit. The Court of Military Appeals has dealt with--

Q Did he deny it at the court-martial?

MR. MELTSNER: Faced with the procedures he was faced with, with no right to counsel and having been taken across a state and put on an island in Long Island Sound, Mr. Justice Marshall--

Q Did he ask for counsel?

MR. MELTSNER: The record is skimpy. It merely states that he was--

Q You are telling us that if he wanted counsel, he could not have had counsel?

MR. MELTSNER: Yes, I am. He had no right to a lawyer.

Q What is your authority on that?

MR. MELTSNER: The naval regulations at the time, Mr. Justice Marshall, provided no right to counsel, and that was the case until 1950 when the Uniform Code--

Q Did he call a civilian counsel?

MR. MELTSNER: No, I am talking about a man who was a lawyer.

Q He had one.

MR. MELTSNER: He had counsel; that could have been anybody--at the time that meant for the Navy any officer who was appointed to help him. It did not mean a legally--

Q That lieutenant could have been the chief justice of some supreme court of some state for all I know.

MR. MELTSNER: That is correct.

Q And for all you know.

MR. MELTSNER: He also could not have graduated high school. It is uncertain. We do not know. All we know is that he had no right to counsel at the time.

Q He did have a right to be represented by somebody else?

MR. MELTSNER: Yes, he did, of course, Mr. Justice Stewart. He had no right to a lawyer.

Q And in this case he did have counsel in that sense, did he not?

MR. MELTSNER: Yes, he did.

Q Did have representation by somebody else.

MR. MELTSNER: He had representation by someone. We do not know whether he had any legal training. That is correct.

The Government relies on two factors in claiming this was a service-connected offense. The first is the absence without leave. But the military has ample power to protect its interests in military discipline by punishing for AWOL, and it is for this very reason that the Court of Military Appeals has held that absence without leave itself is not sufficient to convert an otherwise civilian offense to a military offense. There is also, as I pointed out, no evidence connecting the absence without leave to the theft.

Now we come to the question of wartime. I will readily concede that military interests are greater in wartime than they are in peacetime, military interests in discipline. But that does not lead me to the immediate

conclusion that O'Callahan has no meaning whatsoever in wartime. I would apply the traditional test that this Court has applied in cases that arose during the Civil War, the First World War, and the Second World War. But it is not simply the fact of wartime that ousts the civilian courts of jurisdiction but whether or not those courts are open and able to deal with the particular offense. This Court again and again--

Q The cases you refer to in the Civil War and in the First World War, it was not the question whether a soldier could be tried by a military court but whether a military court could try a civilian.

MR. MELTSNER: That is correct. I believe there are some of those cases where the person is military-connected. But in many of those cases it deals with civilians. But the test was--

Q Were any of them soldiers? Were any of them members of the military?

MR. MELTSNER: Not to my knowledge. But the test was the same, it seems to me, restricting military jurisdiction to the narrowest possible scope necessary. So, I do not think that the fact that the United States was at war ends the matter. The question is whether prosecution of this case in the civilian courts affected the war effort in any way. Where is the theatre of operations? And it is for

this reason, because there was no specific connection, that the courts below held that wartime was not sufficient in and of itself. This man was so important to his military unit that he was taken immediately and lodged on an island in the middle of Long Island Sound. There was no attempt to keep him with his unit to do anything. He was then sent away for three years.

In short, if the Government prevails on this point in this case, O'Callahan has no meaning whatsoever in wartime, and I think that is contrary to its entire spirit of limiting the special jurisdiction by principles of necessity and strictly limiting. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Meltsner and Mr. Solicitor General. Thank you, gentlemen. The case is submitted.

Mr. Meltsner, you appeared in this case by our appointment at our request. Thank you for your assistance to the Court and, of course, for your assistance to your client.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:56 o'clock a.m. the case was submitted.]

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